Supreme Court, U.S.
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No. 05-1419

IN THE

Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Steven T. Waugh submits this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Ninth Circuit in *Lively* v. *Wild Oats Markets, Inc.*, 2006 U.S. App. LEXIS 18793 (9th Cir. July 27, 2006).

The Ninth Circuit's opinion in *Lively* conflicts with the Eighth Circuit's decision in this case on the precise question presented for review. The Ninth Circuit thus joins the First, Second, Third, Fifth, Sixth, and Seventh Circuits, which all have held that the presence of a forum-state defendant is not a jurisdictional defect, and thus is waived if not raised by motion within 30 days of the notice of removal. *See* Pet. 10-14.

Lively is a personal injury action in which the plaintiff claims damages due to a slip-and-fall accident in the defendant's store. 2006 U.S. App. LEXIS 18793, at *6. As here, the defendant removed the action to federal court because there was complete diversity and the amount in controversy exceeded $75,000. *Id.* at *1. And as here, the plaintiff did not object to the removal, but the district court *sua sponte* "determined that diversity jurisdiction did not exist because [defendant], contrary to the removal requirement of 28 U.S.C. § 1441(b), was a citizen of" the forum state. *Id.* at *2. The district court "treated this requirement as a jurisdictional limitation," and remanded the case to state court. *Id.*

The Ninth Circuit disagreed and vacated the district court's remand order. The court held that "the forum defendant rule is procedural, and therefore a violation of this rule is a waivable defect in the removal process that cannot form the basis for a district court's *sua sponte* remand order." *Id.* at *4 (footnote omitted). The court further held that "28 U.S.C. § 1447(d) does not bar appellate review of the district court's remand order,

which was based on [defendant's] violation of the forum defendant rule." *Id.*

With regard to its jurisdiction to hear the appeal, the court stated that "although [28 U.S.C.] § 1447(d) limits appellate review of district court remand orders, this does not mean that we must simply turn this case away because the district court asserted that it lacked jurisdiction." *Id.* at *8. Instead, the court stated that it "must determine whether the district court correctly applied § 1447(c) by deciding that the forum defendant rule is a jurisdictional limitation that may be invoked *sua sponte*," and that the answer to this question would determine the court's own jurisdiction, which the court has jurisdiction to decide. *Id.* at *7-*8.

Turning to the substance of the appeal, the court held that the forum defendant rule is an "additional limitation on diversity-based removal" that is "a procedural, or nonjurisdictional, rule." *Id.* at *13. The court traced the history of the § 1447(c), noting that as originally written, the statute allowed a district court to remand if the case was removed "'improvidently and without jurisdiction.'" *Id.* at *14, quoting 28 U.S.C. § 1447(c) (1948). The court observed that the statute was revised in 1988 to reflect that "any defect in the removal process" must be raised by motion within 30 days, while lack of jurisdiction required remand at any time before final judgment. *Id.* The court then looked to the 1996 revision to § 1447(c), which changed "defect in the removal process" to "any defect other than lack of subject matter jurisdiction." *Id.* at *15. The court quoted the Eleventh Circuit's statement that this revision "would seem to address neatly" the divergent interpretations of § 1441(c) "that had troubled the courts under the 1988 version, suggesting that removal in violation of § 1441(b) is subject to the 30-day time limit." *Id.*, quoting *Snapper, Inc.* v. *Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999).

The court then looked to the "purpose of the forum defendant rule." *Id.* at *16. The court stated that removal in a diversity case is "intended to protect out-of-state defendants from possible prejudices in state court," but that this protection is unnecessary when the defendant is a citizen of the forum state. *Id.* The forum defendant rule thus "allows the plaintiff to regain some control over forum selection by requesting that the case be remanded to state court." *Id.* The court reasoned that the rule is procedural because the plaintiff may choose to move to remand or not, and "[e]ither way, the plaintiff exercises control over the forum." *Id.* at *17.

The Ninth Circuit's opinion also noted the split among the circuits, and stated that "the Eighth Circuit is the sole circuit on the jurisdictional side" of the question. *Id.* at *17-*18.[1] The court examined the Eighth Circuit's decision in *Hurt* v. *Dow Chemical Co.*, but "like the courts that have considered *Hurt*," it "reject[ed] the Eighth Circuit's approach." *Id.* at *19-*20. "In sum," the court held, "the legislative history of § 1447(c), the policy rationale of § 1441(b), the result reached by the 'overwhelming' majority of our sister circuits, and Supreme Court precedent compel our holding" that the forum defendant rule is not jurisdictional.

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[1] The Ninth Circuit stated that its interpretation "comports with eight of the nine circuits that have addressed this issue." 2006 U.S. App. LEXIS 18793, at *17. In addition to the circuits listed in the petition, the court included the Tenth and Eleventh Circuits among those who have found the forum defendant rule to be nonjurisdictional. Petitioner agrees that the Eleventh Circuit would rule this way, but it has not had an opportunity to do so since *Snapper*. Similarly, while the Tenth Circuit's decision in *Am. Oil Co.* v. *McMullin*, 433 F.2d 1091 (10th Cir. 1970), described the forum defendant rule as a "technical" violation, Petitioner has not located a case in which that court directly held that the rule is nonjurisdictional.

The Ninth Circuit's opinion in *Lively* further exacerbates the circuit split identified in the petition for certiorari. The question has been broadly considered by the courts of appeals, which have overwhelmingly adopted the interpretation contrary to the Eighth Circuit's opinion in this case. The Eighth Circuit has declined to reconsider its position *en banc*, and the split is therefore likely to persist without a decision from the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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